

No. 75-1769

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

THE GREAT UNITED REALTY COMPANY, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The question presented in this federal income tax case is whether a notice of an income tax deficiency issued by the Commissioner of Internal Revenue to petitioner was invalid because the name and address of petitioner, as set forth in the notice, contained minor discrepancies.

The pertinent facts are as follows: Petitioner is a corporation whose formal name is The Great United Realty Company, Incorporated, and whose street address is 516 St. Paul Place. The notice of deficiency was addressed to "Great United Realty Company, Inc." at "516 St. Paul Street." The notice was delivered to petitioner's office, but Milton F. Kirsner, petitioner's president, refused to accept the notice on the ground that the name and address were erroneously stated. Petitioner thereupon brought this suit in the United States District Court for the District of Maryland to enjoin collection of the taxes

at issue. The district court entered summary judgment for the government (Pet. App. A 1-2)¹ and the court of appeals affirmed *per curiam* (Pet. App. B 3-4).

1. Section 6212 of the Internal Revenue Code of 1954 (26 U.S.C.) authorizes the Commissioner of Internal Revenue to notify taxpayers by mail of the determination of a tax deficiency. Section 6213(a) allows a taxpayer to file a petition for redetermination of a deficiency in the Tax Court within 90 days after a notice of deficiency is mailed. The Anti-Injunction Act, Section 7421 of the Code, prohibits suits to restrain the assessment or collection of taxes. However, with certain exceptions not here relevant, Section 6213(a) permits such injunctive actions against the assessment or collection of taxes until the notice of deficiency has been mailed to the taxpayer and the period for filing a petition in the Tax Court has expired.

Here, petitioner's claim to injunctive relief rests upon its contention that it never received the notice of deficiency. Petitioner's president testified that, although the notice was delivered to his office by certified mail, he refused to accept it because of the errors in the name and address. Petitioner contends (Pet. 7) that it was entitled to refuse the notice because it "did not bear the petitioner's true name."

But it has been uniformly held that where the notice of deficiency was delivered to the proper address, it was not invalidated by minor discrepancies in the address. See, e.g., *Wright v. Commissioner*, 101 F. 2d 309 (C.A. 4); *Whitmer v. Lucas*, 53 F. 2d 1006 (C.A. 7). Moreover, where delivery of a notice of deficiency is attempted at

¹A portion of the opinion of the district court is omitted from the appendix to the petition (Pet. App. A 1-2). We therefore set forth the full opinion of the district court in the Appendix. *infra*.

the proper address, the notice is not invalidated by a taxpayer's refusal to accept it. *Brown v. Lether*, 360 F. 2d 560 (C.A. 8). Indeed, if the notice is properly mailed to the taxpayer's last known address, it is valid even if the taxpayer never receives it. See Section 6212(b), Internal Revenue Code of 1954; *Luhring v. Glotzbach*, 304 F. 2d 556 (C.A. 4). See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306.²

2. Petitioner further contends (Pet. 9-10) that it has been denied the benefits of the deficiency dividends deduction provisions of Section 547 of the Code. Section 547 provides that where liability for personal holding company taxes has been determined in any court of competent jurisdiction, the taxpayer is entitled to a deduction for deficiency dividends thereafter declared and paid for the taxable year involved. If the deduction results in an overpayment of personal holding company taxes, the taxpayer may file a claim for refund for the overpayment.

Although petitioner would have been entitled to the benefits of Section 547 had the Tax Court ruled adversely to it on the merits, it cannot complain (Pet. 9) that it has been "deprived of his [*sic*] opportunity to have his [*sic*] case heard in the United States Tax Court" when it had ample opportunity to file a petition in the Tax Court but failed to do so. At all events, the matter is still not irreparable, for corresponding relief is available under Section 547 if

²The authorities upon which petitioner relies (Pet. 7-9) are distinguishable. Those cases involved situations where the notice was sent to a nonexistent taxpaying entity, or to the purported representative of a nonexistent entity, or to an individual who did not properly represent the taxpayer against which a deficiency had been determined. *Shea v. Commissioner*, 31 B.T.A. 513; *Dombrowski v. Commissioner*, 35 B.T.A. 1028; *J. A. Hampton & Son v. Commissioner*, decided April 11, 1934, P-H Memo B.T.A. para. 34,193 (30 B.T.A. 1462).

petitioner chooses to litigate its personal holding company tax liability in a suit for a refund.³

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

³Petitioner also contends (Pet. 10-11) that the case should be remanded for a poll of the judges of the court of appeals as to whether there should be a rehearing *en banc*. The order denying rehearing (Pet. App. A 5), entered by the panel which decided the case, indicated that there was a suggestion of rehearing *en banc* but no request for a poll. Rule 35(b) of the Federal Rules of Appellate Procedure provides that there shall be no poll as to rehearing *en banc* unless it is requested by "a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard * * *." *Moody v. Albemarle Paper Co.*, 417 U.S. 622, upon which petitioner relies, does not purport to determine the circumstances under which such a poll shall be taken, but only how the poll shall be conducted, *i.e.*, which judges shall vote.

APPENDIX
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE GREAT UNITED REALTY COMPANY, INCORPORATED

v.

UNITED STATES OF AMERICA and BALTIMORE
FEDERAL SAVINGS AND LOAN ASSOCIATION,
a body corporate

CIVIL NO. T 74-1191

Filed: March 19, 1975

John D. Sebastian, of Silver Springs, Maryland, for plaintiff.

Parker B. Smith, Assistant United States Attorney, of Baltimore, Maryland, and Richard F. Mitchell, Trial Attorney, Tax Division, Department of Justice, of Washington, D.C., for United States.

Thomsen, Senior District Judge

This is an action by a corporate taxpayer to enjoin the collection of an assessment of additional income taxes against it for the taxable year ended March 31, 1971. Plaintiff claims that the assessment was made after the expiration of the statutory period of limitations and that the administrative levy is excessive in amount.

The government has moved to dismiss or in the alternative for a summary judgment in its favor for lack of jurisdiction. Since testimony has been taken and exhibits submitted, the motion to dismiss will be treated as a motion for summary judgment.

This action does not come within any of the statutory exceptions to the anti-injunction act, § 7421 (a) of the Internal Revenue Code of 1954, 26 U.S.C. 7421 (a), and is barred by that statute unless plaintiff can establish "that under no circumstances could the Government ultimately prevail". *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1972). As the Court said in that case, also at p. 7: "We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." Plaintiff has an adequate remedy under the procedures authorized by the Internal Revenue Code.

1. The assessment was made on July 22, 1974. The return shows that it was signed on July 29, 1971, and was received with remittance on August 3, 1971. The assessment was made within the statutory period, which runs from the date of filing and not from the date when it should have been filed. § 6501.*

2. Plaintiff alleges that it "believes and affirms that the aforesaid Notices of Levy and Final Notices Before Seizure are illegal and excessive and are, in fact, not due and owing". It appears from the documents submitted by the respective parties that it is by no means clear that the Government cannot establish its claim.

* Plaintiff's contention, made through its president, that it did not receive the statutory notice of deficiency, which was mailed to it on February 19, 1974, is therefore immaterial, as well as frivolous. Plaintiff's president testified that he did not accept the envelope containing the notice because it was addressed to Great United Realty Company, Inc., rather than to The Great United Realty Company, Inc. The mailing of the notice extended the time within which an assessment might be made. See § 6503 (a) (1) and *Aura Grimes Bales v. Commissioner*, 22 T.C. 355 (1954).

Judgment will therefore be entered dismissing this action, without prejudice to any right plaintiff may have to challenge the assessment in any manner provided by law.

(signed Roszel C. Thomsen)

Senior United States District Judge